

THE HON'BLE MR JUSTICE RAMESH RANGANATHAN

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WRIT PETITION No: 16309 of 2005

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DATED: 05.08.2005

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BETWEEN:

Ushodaya Engineers ... PETITIONER.

AND

Karimnagar District Milk Producers Mutually
Aided Co-operative Union Limited, & another
... RESPONDENTS.

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ORDER:

The grievance of the petitioner, in this writ petition, is that though it was the lowest tenderer, in respect of three out of the ten items which formed part of the tender notification dated 16-06-2005, the said tender notification was cancelled without assigning any reasons and a fresh notification was issued on 16-07-2005 for seven of the ten items excluding the three items for which the petitioner was the lowest tenderer.

Learned counsel for the petitioner relies on the judgment of the Supreme Court in ***STAR ENTERPRISES AND OTHERS v CITY AND INDUSTRIAL DEVELOPMENT CORPORATION OF MAHARASHTRA LIMITED***, wherein it was held that while the tendering authority was entitled to accept a bid other than that of the lowest tenderer, it was required to assign reasons for not accepting the lowest bid.

Learned counsel for the petitioner, refers to the averments in paragraph Nos.5 and 6 of the affidavit, and contends that cancellation of the earlier notification dated 16-06-

2005 was *mala fide* and the conditions prescribed in the subsequent notification dated 16-07-2005 was tailor made to exclude the petitioner from participating in the tender process and to favour others for extraneous considerations. Learned counsel contends that cancellation of the earlier notification dated 16-06-2005, without assigning reasons, violates the petitioner's fundamental rights under Article 14 of the Constitution of India.

An affidavit is filed, on behalf of the petitioner, contending that the Karimnagar District Milk Producers Mutually Aided Co-operative Union Limited is a State within the meaning of Article 12 of the Constitution of India, inasmuch as, the funds of the Society are borne by the Central Government to the extent of 75% and the State Government to the extent of 25%, that the second respondent, who is the Chairman of the Purchase Committee and the Joint Collector of the District, monitors the progress of the 1st respondent, that a Consultative Committee is constituted for the first respondent with 10 to 15 State Government officials, wherein officials of the Animal Husbandry, the Director of DRDA, the District Co-operative Officer, are some of the officials, who monitor the affairs of the 1st respondent, that the 1st respondent satisfies the tests laid down by the Supreme Court in *Ajay Hasia* and *Pradeep Kumar Biswas* case and therefore, the 1st respondent is a "State" within the meaning of Article 12 of the Constitution of India.

The averments in the affidavit do not satisfy all the tests prescribed for determining whether or not the 1st respondent is an instrumentality of State within the meaning of Article 12 of the Constitution of India.

This question need not however detain this court as no case has been made out by the petitioner, even on merits, for invocation of the extraordinary jurisdiction of

this Court under Article 226 of the Constitution of India. Except for a bald allegation of malice and that the tender notification dated 16-06-2005 was cancelled for extraneous considerations, the affidavit does not name the person who is alleged to have acted with malice or the persons who are alleged to have been favoured for extraneous considerations. As held by the Supreme Court in **STATE OF BIHAR v P.P.SHARMA**, in the absence of the person against whom malafide is attributed, being named and arrayed as a respondent in the writ petition *eo nomine*, allegations of malafides cannot be examined. It is also well settled that mere allegations of malice would not suffice and the degree of proof required to establish malice is of a very high order. (**E.P.ROYAPPA v STATE OF TAMILNADU**). The allegation of extraneous consideration or that the conditions stipulated in the fresh notification are tailor made cannot also be accepted in the absence of any particulars being stated in the affidavit as to who are the persons sought to be favoured, and as to how the conditions stipulated are tailor made to suit their requirements.

The only contention which remains to be considered is as to whether the first respondent was required to assign reasons for cancellation of the tender notification dated 16-06-2005. The judgment of the Supreme Court in **STAR ENTERPRISES** is of no assistance to the petitioner. In **STAR ENTERPRISES** the Supreme Court held that while dealing with tenders the State is entitled to look for the best deal and for that it can refuse to accept even the highest bid. However, while rejecting the highest offer, it must record reasons for such action and communicate the same to the concerned party. It is not the case of the petitioner that despite their being the lowest tenderer, a higher bid was accepted. On the other hand their grievance is with regard to the cancellation of the entire tender notification dated 16-06-2005. The judgment of the Supreme Court in **STAR ENTERPRISES** does not apply to cases involving cancellation of a tender notification. Even according to the petitioner, the

three items, for which it was the lowest tenderer, are not included in the fresh tender notification.

The grievance of the petitioner is that it has not been awarded the works for the three items for which it was the lowest tenderer. Petitioner cannot claim violation of its fundamental right nor can it insist that the Government should enter into a contract with it. The mere fact that the petitioner is the lowest tenderer does not entitle it to claim that it should be awarded the work or that the Government should not cancel the tender notification. The petitioner, in effect, is seeking specific performance of a contract, which are matters, normally, not the subject matter of adjudication in proceedings under Article 226 of the Constitution of India. Rights, if any, accrued in favour of the petitioner are nebulous in nature and cannot form the basis or the foundation for issuing a Writ in the nature of Mandamus (**LOTUS CONSTRUCTIONS, VIJAYAWADA v. GOVERNMENT OF A.P.**). It is settled law that no rights get crystallized in favour of the lowest tenderer to be awarded the work and it is always open to the authorities concerned, for just and valid reasons, to cancel the entire tender process. Cancellation of a tender cannot be called in question by the lowest tenderer except where it is established that its cancellations is for extraneous reasons, tainted with malice or is so arbitrary as to violate Article 14 of the Constitution of India. Except for a bare averment that the action of the respondent is arbitrary, nothing has been stated as to how issuance of the fresh tender notification dated 16-07-2005 is in violation of Article 14 of the Constitution of India.

The writ petition is without merit and is accordingly dismissed. No costs.

RAMESH RANGANATHAN, J

Date: 05-08-2005

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